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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Wildlife Research Center, Inc.

Serial No. 78444661

Gerald E. Helget of Briggs and Morgan, P.A. for Wildlife Research Center, Inc.

Martha L. Fromm, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow, Managing Attorney).

Before Quinn, Grendel and Walsh, Administrative Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration on the Supplemental Register of the mark DOE IN ESTRUS (in standard character form) for Class 28 goods identified in the application as "buck lures and doe scents used in hunting."¹

¹ Serial No. 78444661, filed July 1, 2004. The application is based on use in commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a), and June 1, 1999 is alleged to be the date of first use of the mark anywhere and the date of first use of the mark in commerce. As originally filed, the application sought registration of the mark on the Principal Register. After the Trademark Examining Attorney issued a first Office action

At issue in this appeal is the Trademark Examining Attorney's final refusal to register applicant's mark on the Supplemental Register on the ground that it is generic and therefore incapable of functioning as a mark for the identified goods. Trademark Act Section 23, 15 U.S.C. §1091.

Applicant and the Trademark Examining Attorney filed main appeal briefs. No reply brief was filed, and no oral hearing was requested. We affirm the refusal to register.

To be registrable on the Supplemental Register, the matter sought to be registered must be "capable of distinguishing applicant's goods or services." Trademark Act Sections 23(a), 23(c). "Generic terms are common names that the relevant purchasing public understands primarily as describing the genus of goods or services being sold. They are by definition incapable of indicating a particular source of the goods or services." *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001) (citations omitted). Because they are incapable of identifying source, generic terms are not registrable on the Supplemental Register.

refusing registration on the ground of mere descriptiveness under Trademark Act Section 2(e)(1), applicant amended the application to one seeking registration on the Supplemental Register.

Our primary reviewing court has stated:

The determination of whether a mark is generic is made according to a two-part inquiry: "First, what is the genus of the goods or services at issue? Second, is the term sought to be registered ... understood by the relevant purchasing public primarily to refer to that genus of goods or services?"

In re Dial-A-Mattress Operating Corp., *supra*, 57 USPQ2d at 1810, quoting from *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 989-90, 228 USPQ 528, 530 (Fed. Cir. 1986). The Office bears the burden of establishing genericness based on clear evidence of generic use. *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999). "Any competent source suffices to show the relevant purchasing public's understanding of a contested term, including purchaser testimony, consumer surveys, dictionary definitions, trade journals, newspapers and other publications." *In re Dial-A-Mattress Operating Corp.*, *supra*, 57 USPQ2d at 1810. Where (as in this case) the matter sought to be registered is a phrase (rather than a compound word), the Office must provide more than mere dictionary definitions showing the genericness of the component words; "it must conduct an inquiry into 'the meaning of the disputed phrase as a

whole.'" *Id.*, quoting from *In re American Fertility Society, supra*, 51 USPQ2d at 1836.

Our analysis begins with a determination of the genus of the services at issue. *See H. Marvin Ginn, supra*. We find in this case that the genus of services is commensurate with applicant's identification of goods in the application, i.e., "buck lures and doe scents used in hunting."

We next must determine whether the purchasing public understands DOE IN ESTRUS to refer to the genus of services at issue. *See H. Marvin Ginn, supra*. The Trademark Examining Attorney has made of record numerous excerpted articles from the NEXIS database, which show that "doe in estrus" is used to refer to a particular type of buck lure and doe scent used by deer hunters. For example (emphasis added):

I found active sign on a ridge that turned out to be from the same buck, and brought him in with fresh **doe-in-estrus** and a few deep grunts. I wound up taking him on Thanksgiving.
Bowhunter, December 1, 2005;

Myriad commercial urine scents with names such as Tink's 69 or Code Blue are bought by hunters trying to fool a buck's nose with **doe-in-estrus** or dominant-buck products.
The News & Observer (Raleigh, NC), November 13, 2003;

Also in my pack are rope, first aid supplies, a flashlight, a down jacket, a blaze-orange balaclava, a compass, matches, **doe-in-estrus** scent, wicks to disperse the scent, a Thermos of coffee, ...

Star Tribune (Minneapolis, MN), November 14, 2004;

When the rut hits, a **doe-in-estrus** lure and a dominant buck urine should do the trick.

The Daily Journal (Vineland, NJ), October 24, 2002;

...aren't ordinarily kept in such proximity, but deer farmed for hunting-preserve brood stock, or for collection of **doe-in-estrus** hunting scents, usually are.

Charleston Daily Mail (West Virginia), April 16, 2002;

I recommend "doe in heat" or "**doe in estrus**" scents, or scents of this kind. I'll just put some on the rag or small towel that I drag behind me...

Star Tribune (Minneapolis, MN), October 28, 2001;

Ekhoff also had a scenting advantage, with a packet of fresh-made **doe-in-estrus** odor hanging halfway up his high 25-foot stand.

Chicago Tribune, December 1, 1999;

Doe in estrus scents are popular buck attractants used by archers.

Wausau Daily Herald (Wausau, WI), November 4, 1999;

He put out his attractor scents, **doe in estrus** and buck lure, and tried rattling to simulate the sound of bucks fighting.

Columbus Dispatch (Ohio), November 19, 1996; and

...stick to rake the ground bare. Hang a 35-mm film canister stuffed with sponge above the scrape and fill with **doe in estrus** scent.

Birmingham News (Alabama), January 15, 1995;

The Trademark Examining Attorney also has made of record numerous printouts from Internet web pages showing generic use of "doe in estrus" to refer to a type of lure or scent. For example (emphasis added):

Many years ago there were dozens of **doe-in-estrus**, buck-in-rut, and other deer scents on the market. All were heavily advertised, touted highly, and I used many while deer hunting. www.illinoiswaters.net;

A deer lure is a substance that's made and designed to attract deer. In other words, when the buck smells the lure, he's supposed to come in looking for whatever gives off that odor. For example, a lure like **doe-in-estrus** is produced for the hunter to put around his stand to hopefully cause a buck to come into the area searching for the estrous doe that's urinated in that spot. www.nightwawkpublications.com;

Deer scent is a confidence builder in whitetails. It makes them believe there are, or were, other deer in the area. Tarsal gland scents may trigger a territorial response in an aggressive buck defending his territory in pre-rut and rut. **Doe-in-estrus** scent may also appeal to a buck's sexual urges and bring him in for an easy shot. www.hunterspec.com;

This is also a great time to experiment with **doe-in-estrus** scents. Find a likely troll zone along a field edge and lay a scent trail right toward your tree. www.northamericanwhitetail.com;

I usually didn't have much confidence in deer scents and lures. However, I had to make this buck move off the logging road at the right angle to keep him from smelling me. Then he had to offer me a shot. I took two strips of cloth, dipped them in **doe-in-estrus** lure and tied one

rag to each of my rubber boots. ... As soon as I climbed up in my tree, two small bucks came into the scrape, picked up the **doe-in-estrus** scent and followed it to under my stand - just as though I had them on a halter leading them along.

www.nighthawkpublications.com;

Attractant scents are effective because they take advantage of a deer's inclination to investigate any urine smell he notices. **Doe-in-estrus** scent is the most commonly used attractant and is intended to attract bucks who are in rut. Many hunters sometimes will put scent canisters near their stand and make scrapes by clearing away some grass and leaves beneath an overhanging branch. **Doe-in-estrus** scent is then applied into the faked scrapes to attract bucks.

www.gamecalls.net;

Carefully doctoring the cleared area with **doe-in-estrus** scent or buck urine and tarsal gland scent can attract deer, as can creating artificial scrapes near core doe areas.

www.fieldandstream.com;

One evening, two years ago, a few days before deer season, I had finished feeding the animals and milking the goats and decided to lay a **doe-in-estrus** scent trail before I ran out of daylight. It was dark by the time I finished so I went to spotlight our alfalfa field with me flashlight. I put the **doe-in-estrus** bottle in my cover-alls' pocket and shone the light across the field.

www.womenhunters.com;

The Code Blue Double Trail Drag System has two drag rags so you can simulate a buck trailing a hot doe by combining dominant buck and **doe-in-estrus** lures or just double your scent dispersal.

www.cabelas.com; and

With a sharp stick or rock, scratch away all vegetation down to bare dirt in a 30-inch circle directly under the tips of the overhead branch.

Pour **doe-in-estrus** lure or buck urine unto the scrape.
www.imoutdoors.com

Several of the Internet pages appear to be advertising references to applicant's products, and they use "doe in estrus" generically in connection with the products. For example:

Ah, the onset of autumn... Time to gear up for deer season! Our shopping list includes 101 items, big and small, to help you nail a big 'un. ... 7. Wildlife Research Center Excite - Super-thick Excite looks more like molasses, but it's concentrated **doe-in-estrus** scent.
The American Hunter, October 2003 (from www.findarticles.com);

Wildlife Research Center® Excite™ is an extra-concentrated **doe in estrus** scent that's so thick it flows much like honey.
www.wildernessoutpost.com;

Wildlife Research Big Game Lures - Special Golden Estrus - 24.00
Made of the highest-quality urines and all-natural ingredients. Packed in amber glass bottles to retain potency and freshness. Special Golden Estrus? - The freshest premium **doe-in-estrus** scent available. Collected only weeks before it's shipped to you.
www.muddybootsshop.com;

We find that this evidence clearly establishes that "doe in estrus" would be recognized by the purchasing public as referring to a type or category of buck lure and

doe scent, and that it therefore is generic for applicant's goods.

Applicant argues, however, that:

All of the examples cited by the Office Action show the use of the term "doe-in-estrus" as an adjective to modify a noun such as "scent" or "product" or "lure", etc. Thus, the term "doe-in-estrus" is not used by the buying public as the name of the product, but as a descriptive term modifying the name of the product. ...the mere fact that a buyer calls for or orders a product by a term does not evidence that that term is generic. This is especially the case where the term is used as an adjective, as it cannot possibly be the name of the product. The articles cited by the Office Action merely show the use of the term "doe-in-estrus" as a species of a larger genus, in fact, of several genera (scents, lures, products, etc.)

Applicant's brief at 2 (emphasis in original).

We are not persuaded by this argument. As noted by Professor McCarthy, "[a] rule of thumb sometimes forwarded as distinguishing a generic name from a descriptive term is that generic names are nouns and descriptive terms are adjectives. However, this 'part of speech' test does not accurately describe the case law results." J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §12:10 (4th ed. updated June 2006). See, e.g., *In re Sun Oil Co.*, 426 F.2d 401, 165 USPQ 718 (CCPA 1970) (CUSTOMBLENDED generic for gasoline); *In re Helena*

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Rubinstein, Inc., 410 F.2d 438, 161 USPQ 606 (CCPA 1969) (PASTEURIZED generic for face cream); and *In re Central Sprinkler Co.*, 49 USPQ2d 1194 (TTAB 1998) (ATTIC generic for automatic sprinklers for fire protection).

In this case, the evidence of record establishes that DOE IN ESTRUS, whether viewed as a noun or an adjective, is generic as applied to applicant's goods. Applicant's arguments to the contrary are wholly unpersuasive. We therefore find that DOE IN ESTRUS is incapable of distinguishing applicant's goods, and that it therefore is not registrable on the Supplemental Register.

Decision: The refusal to register on the Supplemental Register is affirmed.